Sykt Chin Seng Supermarket v United Continental Insurance Sdn Bhd

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 30/1981
NIK HASHIM JC
15 DECEMBER 1996

Civil Procedure *— Discovery — Application for production of documents — Whether document was privileged — Objection by insurer to the production of adjuster's report at trial — Application of uberrimae fidei principle — Court's discretion to order party to produce any document — Exercise of discretion dependent on the merit of the case — Rules of the High Court 1980 O 24 rr 12 & 13 — Evidence Act 1950 ss 126 & 126(1)*

Evidence *— Privilege — Adjuster's report — Whether report was within the scope of professional privilege under s 126 of the Evidence Act 1950 — Whether the fact that the report may cause prejudice to the defence was relevant for the purpose of discovery and production — Evidence Act 1950 ss 126 & 126(1)*

The plaintiff applied under O 24 rr 12 and 13 of the Rules of the High Court 1980 ('the RHC') for an order that the defendant be ordered to produce before the court the adjuster's report. The report was prepared by a professional adjuster, well before litigation was contemplated, upon the defendant's instruction and submitted to them to determine the plaintiff's claim for loss and damage to their stock-in-trade in the premises of the latter's supermarket during a flood which occurred 16 years ago. The adjuster had since left the adjusting firm. The existence of the adjuster's report was not disputed. In the suit, the defendant had denied liability and quantum claimed. Learned counsel for the defendant objected to the application on the ground of privilege under s 126(1) of the Evidence Act 1950 ('the Act') and that the report, if produced, would prejudice the defence. On the other hand, it was contended on behalf of the plaintiff that the report was an independent one, not privileged from disclosure and was necessary to support the plaintiff's claim.

Held, allowing the application:

(1) Section 126 of the Act which was the only relevant provision governing professional privilege was strictly limited to legal communications of solicitor and client relationship (see p 124I).

(2) The effect of O 24 r 12, which should be read with r 13, was that it gives the power to the court at any stage of the proceedings to order any party to produce to the court any document in his possession, custody or power. By the terms of the provisions under the rules, the power of the court to order production of any document was discretionary in nature, the exercise of which depended on the merits of each case (see pp 125I and 126A–B).

(3) The adjuster's report was outside the scope of the privilege of solicitor and client relationship. There was no evidence of confidential relationship established between the adjuster and

the defendant in this case. The report was independent and not privileged from disclosure.

The fact that the adjuster's report, if produced and tendered as an exhibit, would prejudice the defence, was irrelevant and speculative for the purpose of discovery and production. The weight of the evidence of the report, if any, was a matter for the court to decide at the trial. The question of prejudice did not arise (see p 126E–G).

(4) The defendant, being an insurance company, was bound by the settled principle of uberrimae fidei. It was the duty of the insurer company to exercise utmost good faith and fair dealing in its transaction with the insured plaintiff. Objecting to the production of the adjuster's report was not a right reflection of that principle being practised by the defendant and destroyed the principle of uberrimae fidei. That being so, the adjuster's report was not privileged under s 126(1) of the Act.

Moreover, the adjuster's report was relevant and vital for disposing of the plaintiff's claim fairly and probably relevant to the defence and ought to be produced and tendered in court through the maker thereof (see pp 126H–I and 127A–B).

Per curiam:

It was not the law that the party seeking the production of a document was entitled to the production as of right. The party had to satisfy the court that its application fitted in with the rules (see p 126B).

[Bahasa Malaysia summary

Plaintif memohon di bawah A 24 kk 12 dan 13 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk satu perintah agar defendan diperintahkan mengemukakan laporan penyelaras di hadapan mahkamah. Laporan tersebut telah disediakan oleh seorang penyelaras profesional, lama sebelum guaman difikirkan, atas arahan defendan dan diserahkan kepada mereka bagi menentukan tuntutan plaintif untuk kehilangan dan kerugian terhadap stok dalam dagangan mereka di premis pasaraya plaintif semasa banjir yang telah berlaku 16 tahun yang lalu. Penyelaras berkenaan sejak itu telah meninggalkan firma penyelaras. Kewujudan laporan penyelaras tersebut tidak dipertikaikan. Dalam guaman itu, defendan telah menafikan liabiliti dan kuantum yang dituntut. Peguam defendan yang bijaksana telah membantah terhadap permohonan tersebut atas alasan perlindungan keistimewaan di bawah s 126(1) Akta Keterangan 1950 ('Akta tersebut') dan bahawa laporan tersebut, jika dikemukakan, akan memudaratkan pembelaan. Sebaliknya, adalah dihujahkan untuk pihak plaintif bahawa laporan tersebut adalah suatu yang bebas, tidak dilindungi keistimewaan dari pendedahan dan adalah perlu untuk menyokong tuntutan plaintif.

A **Diputuskan**, membenarkan permohonan tersebut:

(1) Seksyen 126 Akta tersebut yang merupakan satu-satunya peruntukan relevan yang mentadbiri perlindungan keistimewaan profesional adalah dengan tegasnya terhad kepada komunikasi perundangan untuk perhubungan peguamcara dan klien (lihat ms 124I).

B

(2) Kesan k 12, yang harus dibaca bersama k 13, adalah bahawa ia memberi kuasa kepada mahkamah pada mana-mana peringkat prosiding untuk memerintahkan mana-mana pihak mengemukakan kepada mahkamah apa-apa dokumen dalam milikan, jagaan atau kuasanya. Melalui terma peruntukan di bawah kaedah-kaedah tersebut, kuasa mahkamah untuk memerintahkan pengemukaan apa-apa dokumen adalah bersifat budi bicara, yang mana pelaksanaannya bergantung kepada merit setiap kes (lihat ms 125I dan 126A–B).

C

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(3) Laporan penyelaras tersebut adalah di luar rangkuman perlindungan keistimewaan perhubungan peguamcara dan klien. Tiada keterangan akan perhubungan sulit dibuktikan antara penyelaras dan defendan dalam kes ini. Laporan tersebut adalah bebas dan tidaklah dilindungi oleh keistimewaan dari pendedahan.

Hakikat bahawa laporan penyelaras tersebut, jika dikemukakan dan dimajukan sebagai suatu ekshibit, akan memudaratkan pembelaan, adalah tidak relevan dan spekulatif bagi maksud penzahiran dan pengemukaan. Kekukuhan keterangan laporan tersebut, jika ada, adalah suatu perkara untuk mahkamah tentukan di perbicaraan. Persoalan kemudaratan tidak berbangkit (lihat ms 126E–G).

E

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(4) Defendan, yang merupakan sebuah syarikat insurans, adalah diikat oleh prinsip mantap uberrimae fidei. Adalah kewajipan syarikat penanggung untuk melaksanakan suci hati yang sepenuhnya dan urusan yang adil dalam transaksi dengan plaintif yang diinsuranskan. Bantahan kepada pengemukaan laporan penyelaras tidak memberikan gambaran yang betul atas prinsip itu seperti yang diamalkan oleh defendan dan memusnahkan prinsip uberrimae fidei. Dalam keadaan begitu, laporan penyelaras tidak dilindungi di bawah s 126(1) Akta tersebut.

G

Tambahan pula, laporan penyelaras adalah relevan dan penting untuk menyelesaikan tuntutan plaintif secara adil dan mungkin relevan terhadap pembelaan dan patut dikemukakan dan dimajukan di mahkamah melalui pembuatnya (lihat ms 126H–I dan 127A–B).

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Per curiam:

I

Bukanlah menjadi undang-undang bahawa pihak yang meminta pengemukaan sesuatu dokumen berhak kepada pengemukaannya secara automatik. Pihak itu perlu memuaskan mahkamah bahawa permohonannya adalah sejajar dengan kaedah-kaedah tersebut (lihat ms 126B).]

Notes

For cases on discovery, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1141–1164.

For cases on privilege, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1376–1400.

Cases referred to

Chua Su Yin & Co v Ng Sung Yee & Anor and other appeals [1991] 2 MLJ 348 (refd)

Compagnie Financiere Et Commerciale Du Pacifique, The v Peruvian Guano Co, The (1882–83) 11 QBD 55 (refd)

Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors [1989] 3 MLJ 445 (refd)

Government of the State of Selangor v Central Lorry Service & Constructions Ltd [1972] 1 MLJ 102 (refd)

Kelly v New Zealand Insurance Co Ltd (1993) 7 ANZ Insurance cases 161–197 (refd)

Longthorn v British Transport Commission [1959] 2 All ER 32 (refd)

PP v Hj Kassim [1971] 2 MLJ 115 (refd)

Legislation referred to

Evidence Act 1950 s 126(1)

Insurance Act 1963

Rules of the High Court 1980 O 24 rr 12, 13

RG Naidu (*Mumtaz bte Mohd Nawi* with him) (*G Naidu & Partners*) for the applicant/plaintiff.

Omar Bakhi Ahmad (*VP Nathan & Partners*) for the respondent/defendant.

Nik Hashim JC: This is an application by summons in chambers by the plaintiff for discovery and production of documents under O 24 rr 12 and 13 of the Rules of the High Court 1980 ('the RHC'). The application is for an order that the defendant be ordered to produce a report known as the adjuster's report. The report was prepared on the instruction of the defendant to determine the claim by the plaintiff who had suffered loss and damage to the stock-in-trade in the premises of Chin Seng Supermarket during the flood in November 1979. This application arose in the course of the trial of the main suit. In the suit, the defendant denied the liability and the quantum claimed. Encik Omar Bakhi Ahmad, learned counsel for the defendant, objected to the application on the ground of privilege and that the report if produced, would prejudice the defence. Encik RG Naidu, for the plaintiff, argued that the adjuster's report was an independent report and not privileged from disclosure. He further said that the report was necessary to support the plaintiff's claim.

The only relevant provision in our Evidence Act 1950 ('the Act') governing professional privilege is s 126. The privilege is strictly limited to legal communications of solicitor and client relationship. Any disclosure, if it is to take place, must be with the absolute consent of the client (see

Chua Su Yin & Co v Ng Sung Yee & Anor and other appeals [1991] 2 MLJ 348), as privilege is that of a client (per Eusoff Chin J (as he then was)) in *Dato' Au Ba Chi & Ors v Koh Keng Kheng & Ors* [1989] 3 MLJ 445 at p 447). With regard to the scope and the limitation of the privilege, Ong CJ (Malaya) in *PP v Hj Kassim* [1971] 2 MLJ 115 (FC) said at p 116:

> The only relevant provision in our Evidence Ordinance excluding professional confidences is s 126, which states that no advocate and solicitor shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him and in the course of his employment as such. This rule is founded on the principle that the conduct of legal business without professional assistance is impossible and on the necessity, in order to render such assistance effectual, of securing full and unreserved intercourse between the two. This privilege does not protect professional disclosures made to clergymen or doctors: see *Phipson on Evidence* (10th Ed) para 587 and commentaries in *Sarkar* on s 126 of the Indian Evidence Act 1872.

(See *Evidence: Practice & Procedure* at p 663 by learned author S Augustine Paul (now JC)).

In *Government of the State of Selangor v Central Lorry Service & Constructions Ltd* [1972] 1 MLJ 102, Mohd Azmi J (as he then was) ruled that the file containing tender documents submitted to the government was not privileged against discovery and inspection by the defendants. See also *Longthorn v British Transport Commission* [1959] 2 All ER 32 where the report of the private inquiry into an accident was held not to be privileged.

For ease of reference, I reproduce the provisions of O 24 rr 12 and 13 of the RHC under which the application for discovery is made, and they are:

Order 24 r 12:

> At any stage of the proceedings in any cause or matter the Court may, subject to rule 13(1), order any party to produce to the Court any document in his possession, custody or power relating to any matter in question in the cause or matter and the Court may deal with the document when produced in such manner as it thinks fit.

Order 24 r 13:

> (1) No order for the production of any documents for inspection or to the Court shall be made under any of the foregoing rules unless the Court is of opinion that the order is necessary either for disposing fairly of the cause or matter or for saving costs.
>
> (2) Where on an application under this Order for production of any document for inspection or to the Court privilege from such production is claimed or objection is made to such production on any other ground, the Court may inspect the document for the purpose of deciding whether the claim or objection is valid.

The effect of r 12, which should be read with r 13, is that it gives the power to the court at any stage of the proceedings to order any party to produce to the court any document in his possession, custody or power; whereas para (1) of r 13 stipulates the guiding consideration for any order for

production and inspection, whilst para (2) empowers the court, where an objection to production or inspection is made on a claim for privilege, to determine the validity of such objection. By the terms of the provisions under the rules, the power of the court to order production of any document, to my mind, is discretionary in nature, the exercise of which depends on the merit of each case. It is not the law that the party seeking the production of the document is entitled to the production as of right. The party has to satisfy the court that its application fits in with the above rules (see 1 *Mallal's Supreme Court Practice* (2nd Ed) at p 317).

In this case, the existence of the adjuster's report is never in dispute. It was prepared by an adjuster, En Michael Tham Pang Fay, who was then working with an adjusting firm known as Thomas Howell Kiewit (M) Sdn Bhd. An adjuster is one who makes a determination of the amount of a claim and then makes an agreement with the insured as to a settlement (*The Canadian Law Dictionary* at p 26). The firm was retained by the defendant to establish the flood loss sustained by the plaintiff. The adjuster had put up a report with his recommendations and submitted it to the insurance company, the defendant, for consideration and decision. Since then, the adjuster had left the adjusting firm, and was unable to recall the contents of the report at the trial. Hence this application.

After hearing submissions from both counsel and having perused the affidavits filed, I come to the conclusion that the adjuster's report is outside the scope of the privilege of solicitor and client relationship. It is not a secret document either. There is no evidence of confidential relationship established between the adjuster and the defendant in this case. With respect, I agree with the submission of En RG Naidu that the report is independent and is not privileged from disclosure. The report was prepared and undertaken by a recognized professional adjuster licensed under the Insurance Act 1963 well before litigation was even contemplated. It was drawn up on the clear instruction of the defendant, which was an insurance company, to ascertain the flood loss. The fact that the report, if produced and tendered as an exhibit, would prejudice the defence, in my view, is irrelevant and speculative for the purpose of discovery and production. The weight of the evidence of the report if any, is a matter for the court to decide at the trial. The question of prejudice, therefore, does not arise. The documents to be produced are not confined to those which would be evidence either to prove or to disprove any matter in question in the action: per Brett LJ in *The Compagnie Et Commerciale Financiere Du Pacifique v The Peruvian Guano Co* (1882–83) 11 QBD 55 at p 62 (CA). Indeed, the defendant, being an insurance company, is bound by the settled principle of uberrimae fidei. It is the duty of the insurer company to exercise utmost good faith and fair dealing in its transaction with the insured plaintiff (see *Kelly v New Zealand Insurance Co Ltd* (1993) 7 ANZ Insurance cases 161–197). Objecting to the production of the adjuster's report containing valuable independent records regarding the flood loss to the stock-in-trade which happened 16 years ago surely is not, to my mind, a right reflection of that principle being practised by the defendant. The objection destroys the principle of uberrimae fidei. That being so, I hold

A that the adjuster's report is not privileged under s 126(1) of the Act and I overrule the objection. I also find that the report is relevant and vital for disposing fairly of the plaintiff's claim, and probably relevant to the defendant's defence too. Its production, in my view, will not prejudice the defence. Since the existence of the document is not in dispute, I order that the adjuster's report be produced and tendered in court through the maker, En Michael Tham. The application is therefore allowed with costs.

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Application allowed.

Reported by Yong Yuan Kea

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